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SUPREME COURT OF THE UNITED STATES

October Term, 1902.

No. 649.

CHAS. H. SHAW, TRUSTEE, Etc., Appellant.

vs.

THE CITY OF COVINGTON, et al., Appellees.

BRIEF FOR APPELLEES ON MOTION TO DISMISS FOR WANT OF JURISDICTION.

For the purposes of this motion, I will briefly state the nature of this action.

On December 3, 1900, the appellant filed its bill of complaint in the United States Circuit Court for the Eastern District of Kentucky, at Covington, seeking to enjoin the City of Covington from erecting a municipal electric light plant to light the streets and public buildings of the City of Covington, Kentucky; the complainant, in substance, alleging "that it has the exclusive franchise and right to furnish electric light to the City of Covington and the inhabitants thereof until April 22, 1907." The complainant alleges farther as a cause of action "that the Suburban Electric Company is a corporation created and existing by the consolidation of the Covington Electric Company of Covington,

Kentucky, The Suburban Electric Illuminating, Heating and Power Company of Newport, Kentucky, and The Citizens' Electric Light Company of Dayton, Kentucky, and that said several constituent corporations, and the stockholders thereof, effected a consolidation of same on April 11, 1894, under the name of 'The Suburban Electric Company,' the complainant herein; that by an act of the legislature of Kentucky, approved April 22, 1882, a charter was granted to one of the aforesaid constituent corporations, The Covington Electric Company of Covington, Kentucky, giving to said company the exclusive franchise of furnishing electric light to the City of Covington, and the inhabitants thereof, for twenty-five years." The complainant claims that by virtue of the consolidation aforesaid that it succeeded to said exclusive franchise of said company, which would expire on April 22, 1907. Subsequently, The Suburban Electric Company attempted to assign and transfer all its property, including said exclusive privilege, to The North American Light Company, a corporation organized and existing under the laws of New Jersey, and that thereafter said North American Light Company attempted to assign and transfer to The Union Light, Heat and Power Company, a corporation of Covington, Kentucky, the said exclusive privilege hereinbefore described. The Union Light, Heat and Power Company of Covington, Kentucky, is now the real party in interest and the complainant herein asserting said exclusive privilege.

The City of Covington desired to erect its own municipal electric light plant, and submitted to the people of the city a proposition to issue bonds to the amount of seventy-five thousand ($75,000.00) dollars for the purpose of erecting and constructing said plant. The people voted in favor of said bond issue, and the city was about to advertise said bonds

for sale when this suit was instituted, and an injunction granted, thus preventing the city from selling said bonds and erecting said light plant.

This case was tried upon its merits in the court below, and judgment was rendered dismissing the petition and dissolving the injunction on the 14th day of October, 1902. On the same day an appeal was prayed by the complainant to the United States Circuit Court of Appeals for the Sixth District, which appeal was granted, and on the same day the appeal bond was fixed at one thousand ($1,000.00) dollars, and an order entered continuing the injunction heretofore granted, in force, pending said appeal.

PROPOSITION DISCUSSED.

The proposition I desire to discuss to the court on this motion is, "that the appeal taken by the complainant to the United States Circuit Court of Appeals for the Sixth District was perfected by the complainant, and the record lodged in said Circuit Court of Appeals, and that when said appeal was perfected to the Circuit Court of Appeals, the Circuit Court for the Eastern District of Kentucky had no further jurisdiction to grant the appellant another appeal to this court."

ARGUMENT.

The first question asked by the court is, "Has this court jurisdiction?" If it has not, it will on an examination of the record and the questions involved, dismiss the appeal, on its own motion, without any limitations or qualifications.

The court will observe, from the record herein, that the appeal to the Circuit Court of Appeals was fully perfected; the appeal bond was executed, petition for appeal was filed

by appellants, and an assignment of errors was filed; citation issued and served upon the appellees herein, and a transcript of the record was filed in the clerk's office of the Circuit Court of Appeals.

After appellants had taken their appeal to the Circuit Court of Appeals, they realized for the first time that that court had no jurisdiction, under the authority of the case of the City of Owensboro *v.* The Owensboro Water Works Company, reported in 115 Federal Reporter, page 318, because in the case at bar, the contention of appellant was and is, "that certain laws of the State of Kentucky have violated the contract between the appellant herein and the State of Kentucky," and because there is no diversity of citizenship, both parties hereto being residents of the State of Kentucky.

The appellants recognizing, after they had perfected their appeal to the Circuit Court of Appeals, that said court had no jurisdiction, filed a motion in said court to dismiss their appeal for lack of jurisdiction, and without prejudice, and for leave to withdraw the record therefrom. The Circuit Court of Appeals sustained said motion to dismiss said appeal, and refused to allow the transcript of the record to be withdrawn from said court.

After said appeal was dismissed by the Circuit Court of Appeals, the appellants applied to the judge of the Circuit Court, for the Eastern District of Kentucky, at Covington, to grant them another appeal to this court, and they filed their petition for appeal and an assignment of errors, and the question now before the court is, "Did the judge of the Circuit Court have the power to grant appellants a second appeal to this court?"

My contention is, that after the judge of the Circuit Court granted appellant an appeal to the Circuit Court of

Appeals, and signed the citation, and the appeal bond was executed, and the transcript of the record lodged in the Circuit Court of Appeals, that his jurisdiction of the case was at an end, and he had no farther control over the case.

The Circuit Court of Appeals could not dismiss the appeal of the appellants without prejudice to their right to apply to the Circuit Court again for another appeal to this court, because the jurisdiction of the Circuit Court was at an end.

This principle seems to be established beyond any question of doubt by decisions of several of the Circuit Courts and by this court.

> "After an appeal has been allowed, and a supersedeas bond is taken, either during or after the term, jurisdiction as to all matters—certainly those of substance—determined by the decree is transferred to the court to which the appeal goes."

Same:

> " Plaintiff brought suit to have a certain claim declared an equitable lien on the property of a railroad company prior to the lien of two mortgages on the same property executed to defendant. Receivers were appointed by the court in accordance with plaintiff's prayer, and took charge of the property under order of court. Subsequently the court declared plaintiff's claim a lien on the property, but subordinate to the mortgages of which it decreed a foreclosure. Plaintiff appealed from the whole decree and gave a supersedeas bond; and, after the expiration of the term in which this decree was rendered, the court, at the instance of defendant, modified its decree so as to order the property in the receivers' hands to be turned over, subject to the court's supervision, and pending the appeal, to the

defendant, who was the trustee under the mortgages, in accordance with the condition in the mortgages that, upon default of payment, the trustee might take possession of the mortgaged property. Held, the court had no power over the decree after the expiration of the term and after the appeal had been perfected, and that the attempted modification was a substantial alteration."

Morgan's Louisiana & T. R. & S. S. Co. *v.* Texas Central Ry. Co., etc., Farmer's Loan and Trust Co., Trustee, *v.* Same (Circuit Court N. D. Texas, October 28, 1887), 32 Federal Reporter, 525.

"A removal of a case to the Circuit Court of Appeals by writ of error ends the jurisdiction of the lower court; and as it cannot entertain a motion to vacate its judgment, in such case after the writ is granted, a second writ of error will not lie to review its denial of such motion."

Citizens' Bank *v.* Farwell, 56 Federal, 539–570.

"It is the rule in federal courts that when all the steps necessary to perfect an appeal have been properly taken, the action is within the control of the appellate court, and a motion for substitution of the appeal bond must be addressed to that court."

Same:

"On the 21st day of January, 1899, The City Trust, Safe Deposit and Surety Company of Philadelphia, the surety on the bond, so tendered by the defendant and accepted by the court, applied to the court for an order granting the surety permission to substitute another bond for such bond so before received, upon the ground that the surety did not contemplate issuing a bond whereby the liability of the surety would extend to the costs and damages directed to be paid by the decree of the trial court. The motion is

denied, without passing upon the merits of the application, because the action has been transferred from this court to the Circuit Court of Appeals, and that court has now exclusive cognizance of the matter."

Morrin v. Lawler. (Circuit Court E. D. New York, January 28, 1899). 91 Federal 693.

In the case of the Providence Rubber Company v. Chas. Goodyear, etc., reported in 73 U. S. 153–157, (18: 762) this court held:

"In equity cases the appellate jurisdiction of this court attaches upon the allowance of the appeal. In order to make the appeal operate, as a supersedeas it is necessary for the appellant to give good and sufficient security for the prosecution of the appeal, and for all costs and damages that may be adjudged against him. This security is usually given by bond, with one or more sureties, and the 22d section of the Judiciary Act requires that it be taken by the judge who signs the citation on appeal. It is not required that the security shall be in any fixed proportion to the decree. What is necessary is, that it be sufficient and when it is desired to make the appeal a supersedeas, that it be given within ten days from the rendering of the decree. The question of sufficiency must be determined in the first instance by the judge who signs the citation, but after the allowance of the appeal, this question as well as every other in the case, becomes cognizable here."

"The power of a justice of a court below over the appeal to this court, and over the security, in the absence of fraud, is exhausted when he takes the security and signs the citation. From that time the control of the supersedeas, as well as the appeal, is transferred to this court."

Same. By the court:

"When the original bond of $1,000 was accepted by the justice and the citation signed, an appeal was allowed and security taken, which operated as a supersedeas. That transferred the jurisdiction of the suit appeal to this court. As this allowance was the act of the justice of the court, and not of the court itself, no such question is presented as was decided in Goddard (Phillips) v. Ordway, 101 U. S. 745 (XXV. 1040), where we held that if the allowance was the judicial act of the court in term time, it might, like any other order in the suit, be set aside on proper showing during the term. The power of the justice over the appeal and the security, in the absence of fraud, was exhansted when he took the security and signed the citation. From that time the control of the supersedeas, as well as the appeal, was transferred to this court, and even here, as we held in Jerome v. McCarter, 21 Wall., 17 (88 U. S. XXII. 515), in the absence of fraud, the action of the justice or judge in accepting the security, within the statute and within our rules adopted for his guidance, was final, so far as it depended on facts existing at the time the security was accepted. It follows that the supersedeas, which resulted from the taking of the security on the 29th of June, is still in force and has never been vacated. Consequently, the court below is without power at this time to proceed with the execution of the decree appealed from, and we will presume that upon an intimation of that kind from us, it will not attempt to do so."

Draper v. Davis et al., 102 U. S. 370–371 (26:121).

This doctrine laid down in the above case was confirmed and upheld by this court in the case of Benjamin U. Keyser, etc., *v.* Henry H. Farr et al., reported in 105 U. S.,

pages 265–267 (26 : 1025), wherein this court held and decided that:

> "After the acceptance of the bond for an appeal and the docketing of the case in this court, the jurisdiction of the court below is gone."

These authorities seem to me to be conclusive of the proposition which I am discussing, to-wit: "That after the judge of the Circuit Court granted the appeal to the Circuit Court of Appeals, and after the appeal bond was executed, and he had signed the citation, and the transcript of the record was lodged in the clerk's office of the Circuit Court of Appeals, his jurisdiction of the case was at an end, and he was thus deprived of any further control over the case, and that said case upon all questions passed from his hands into the Circuit Court of Appeals for all purposes." If this is true, and the proposition seems to be sustained by numerous decisions of this court and several of the Circuit Courts, it necessarily follows that the judge of the United States Circuit Court for the Eastern District of Kentucky had no jurisdiction or power to grant appellants this appeal herein to this Honorable Court, and if this is true, it must follow that the appeal is not properly before this court, and it has no jurisdiction to entertain the same.

It is respectfully submitted that the motion to dismiss the appeal for want of jurisdiction should be sustained and the appeal dismissed.

All of which is respectfully submitted.

F. J. HANLON,

Solicitor for Appellees.

AUTHORTIES CITED.

Morgan's Louisiana & T. R. & S. S. Co. *v.* Texas Cent. Ry. Co., etc.; Farmer's Loan and Trust Co., Trustee, *v.* Same, 32 Federal, 525.

Citizens Bank *v.* Farwell, 56 Federal, 539–570.

Morrin *v.* Lawler, 91 Federal, 693.

Providence Rubber Co. *v.* Goodyear, etc., 73 U. S. 153–157 (18 : 762).

Draper *v.* Davis et al., 102 U. S. 370–871 (26 : 121).

Keyser *v.* Farr et al., 105 U. S. 265–267 (26 : 1025).

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No. 649.

CHAS. H. SHAW, TRUSTEE, Etc., Appellant.

vs.

THE CITY OF COVINGTON, et al., Appellees.

BRIEF FOR APPELLEES, ON MOTION TO AFFIRM.

I believe it is the practice of this court, that there may be united with a motion to dismiss an appeal, a motion to affirm, and that where the appellee has a color of right to dismissal, motion to affirm will be considered. (Whitney v. Cook, 9 Otto, 607; Hinckley v. Morton, 13 Otto, 764.)

This court, as I understand, will sustain a motion to affirm, if the appeal is taken for delay only. Micas v. Williams, 14 Otto, 556; The S. C. Tryon, 15 Otto, 267), or the questions of law have already been decided here. (Swope v. Leffingwell, 15 Otto, 3.)

I believe, that a consideration of the record herein will show that this appeal was taken for delay only, and in order to prevent the appellee, City of Covington, from erecting its own municipal electric light plant until the expiration of the charter granted to the old Covington Electric Company, which expires in 1907. The object, I think, is plain that it is the desire of the appellant to keep this case in court until such time.

The question, as to whether or not a corporation can, by consolidation with another company, pass an exclusive franchise, such as is in question here, has been settled beyond a shadow of doubt by many decisions of this court. The question as to whether one corporation can sell an exclusive privilege such as is in question here, to another corporation, without express authority from the Legislature so to do, is, I take it, settled by many decisions of this court, beyond any question of doubt. The record herein will show that the old Covington Electric Company had no power and was not empowered by the Legislature of the State of Kentucky to sell or assign said exclusive franchise, and in the absence of such power said company cannot sell, either by consolidation with another company, or by sale to another company, such a valuable privilege.

This doctrine has been confirmed by this court in the case of Shields v. Ohio, 95 U. S. 319, (24:357), wherein this court has held:

> "When the consolidation was completed, the old corporations were destroyed, a new one was created, and its powers were granted to it in all respects, in the view of the law, as if the old companies had never existed, and neither of them had ever enjoyed the franchises so conferred."

In Maine Central R. R. Co. v. State of Maine, 96 U. S. 499–513, (24:836), wherein the question was involved, as to whether an "exemption from taxation", held by a corporation passed to a consolidated company by virtue of the consolidation. This court in deciding this case, held:

> "So long as these companies were distinct corporations, only the tax thus prescribed could be imposed upon them. But when they were merged in the new

corporation, their distinct corporate existence ceased, except so far as their existence might be necessary for the protection of their creditors or mortgagees, or those of the new corporation."

This doctrine was confirmed in the case of the Atlantic & Gulf R. R. Co. v. State of Georgia, 98 U. S. 359, (25:185); also in the case of Keokuk & Western R. R. Co. v. State of Missouri, 152 U. S. 301, (38:450), Yazoo & Miss. Valley R. R. Co. v. Wirt Adams, 180 U. S. 2, (45:396.)

These cases and many others I could cite to the court, decide conclusively, that an exclusive franchise or privilege of the nature such as is claimed by appellant herein, cannot be passed to another corporation by virtue of a consolidation. Neither can an exclusive franchise, such as is claimed by appellant herein, be transferred or sold for a consideration by one corporation to another, unless expressly authorized by the Legislature of a state so to do. An inspection of the record herein will show, that neither in the act creating the old Covington Electric Company, or in the articles of incorporation of the Suburban Electric Company, that neither of said companies was given any power, or have any power, to sell or assign the exclusive franchise in question herein. I take the law to be well settled by this Honorable Court, upon this proposition, "that unless expressly authorized by a Legislature so to do, a corporation cannot sell or assign such an exclusive franchise."

This has been decided in many cases by this court, to which I will refer to a few.

In Beman v. Rufford, 1 Sim. (U. S.) 550; Winch. v. R. R. Co., 13 L. ffi. Eq. 506, the court held and decided:

"A lease by a railroad company of all of its road, rolling stock and franchises, for which there is no authority given in its charter, is ultra vires and void.

"The franchises and powers granted to such corporations, are in a large measure designed to be exercised for the public good, and this exercise of them, is the consideration of the public grant. Any contract by which the corporation disables itself to perform those duties to the public, or attempts to absolve it from their obligations, without the consent of the state, is a violation of its contract with the state, and is forbidden by public policy, and is, therefore, void."

"A law providing that the purchasers under a foreclosure sale of a railroad should forthwith be a corporation and 'should succeed to all such franchises, rights and privileges as would have been had by the first company, but in such sale and conveyance' did not confer an exemption from taxation to the new corporation formed by the purchaser under the foreclosure sale. The new corporation does not take any exemption or immunity from taxation, which belonged to the old company, although this was one of the franchises of the first company." Chesapeake & Ohio R. R. Co. v. Miller, 114 U. S. 176.

In Memphis & Little Rock R. R. Co. v. Berry et. al., 112 U. S., 609, (28:837), this court decided:

"An exememption from taxation must be construed to have been a personal privilege of the very corporation, specifically referred to, and to have perished with that, unless, the express and clear intention of the law requires the exemption to pass as a continuing franchise to a successor."

This doctrine was reiterated and confirmed in the case of Wm. W. Gibbs v. The Consolidated Gas Co. of Baltimore City, decided in 130 U. S. 396, (32:979), wherein this court held:

"A corporation cannot disable itself by contract from performing the public duties which it has undertaken, nor, by agreement, compel itself to make public accommodation subservient to its private interests."

To the same effect see case of Oregon Railway & Navigation Co. v. The Oregonian Railway Company, 130 U. S. 1, (32:837), wherein this court, after an elaborate opinion, in which it reviewed the former opinions and decisions of the court upon said proposition, sustained the doctrine, "that a corporation has no right to sell or transfer its franchise unless specially authorized by law so to do."

The court, in this case held further:

"The words 'successors and assigns' which was embraced in the charter of said company did not authorize said company to transfer and sell its exclusive franchise."

"A grant to each of two new corporations of the powers, rights and capacity, which had been granted to a corporation which they succeeded does not confer on the new company the exemption conferred upon the original company from legislation, chang the rates of toll."

Covington & Lexington Turnpike Road Co. v. A. P. Sanford, 164 U. S. 578.

To the same effect see case Minn. & St. L. R. R. Co. et. al. v. Gardner, 177 U. S. 330, (44:793), and also L. & N. R. R. Co. v. Com'th Kentucky, et. al., 161 U. S. 677, (40:849), wherein this court held:

"The important power to purchase or consolidate a railroad with another line cannot be inferred from such indefinite language as '*to unite or connect with such road.*' The doubts with regard to the authority granted in a corporate charter ought to be resolved

against the corporation. To make a purchase of one railroad by the owner of a parallel line valid, the former must have power to sell, as well as the latter power to buy."

In conclusion, it is respectfully submitted that the propositions of law discussed herein, for the purposes of this motion, have been settled beyond any question of doubt by this court in the cases to which I have referred to herein. The record will show that neither the Covington Electric Company, nor the Suburban Electric Company, was empowered to sell or assign said exclusive franchise; and in the absence of such power, it must necessarily result, if this is true, that the appellant herein did not take or come into possession of the said exclusive franchise by virtue of the consolidation, or by virtue of the attempted transfer of said exclusive franchise from the said Covington Electric Company to the said Suburban Electric Company. The present party in interest, the Union Light, Heat and Power Company, did not receive or come into possession, and is not possessed of said exclusive franchise, by virtue of the attempted sale of same, by said Suburban Electric Company to the North American Light Company, and the re-sale by said North American Light Company to the Union Light, Heat and Power Company.

It is respectfully submitted, that these questions of law have been finally and conclusively decided and established by many decisions of this court, and that the record herein will show that there is absolutely no merit in the contentions of appellant herein to said exclusive franchise, but that said appeal has only been taken to this court (after the appeal to the Circuit Court of Appeals was dismissed), for the purposes of delay only, and to prevent the appellee city herein,

from erecting its own municipal light plant to light its streets and public buildings.

It is respectfully submitted that the motion to affirm should be sustained.

F. J. HANLON,
Solicitor for the Appellees.

AUTHORITIES CITED.

Whitney v. Cook, 9 Otto 607. Hinckley v. Morton, 13 Otto 764. Micas v. Williams, 14 Otto 556. The S. C. Tryon, 15 Otto, 267. Swope v. Leffingwell, 15 Otto 3. Shields v. Ohio, 95 U. S. 319, (24: 357). Main Cent. R. R. Co. v. State of Maine, 96 U. S. 499—513, (24: 836). Atlantic & Gulf R. R. Co. v. State of Georgia, 98 U. S. 359, (25 : 185.) Keokuk & Western R. R. Co. v. State of Missouri, 152 U. S. 301, (38 : 450.) Yazoo & Mississippi Valley R. R. Co. v. Wirt Adams 180 U. S. 2, (45: 396.) Beman v. Rufford, 1 Sim. (U. S.) 550. Winch v. R. R. Co., 13 L. ffi. Eq. 506. Chesapeake & Ohio R. R. Co. v. Miller, 114 U. S. 176. Memphis & Little Rock R. R. Co. v. Berry et al. 112 U. S., 609, (28: 837). Gibbs. v. Consolidated Gas Co. of Baltimore City, 130 U. S. 396 (32: 979). Oregon Ry. & Navigation Co. v. Oregonian Ry. Co. 130 U. S. 1, (32: 837). Covington & Lexington T. P. Road Co. v. Sandford, 164 U. S. 578. Minn. & St. L. R. R. Co. et al. v. Gardner, 177 U. S. 330, (44: 793). L. & N. R. R. Co. v. Comonwealth of Kentucky, et al. 161 U. S. 677 (40: 849).